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Salvaging Proportionate Prison Sentencing: A Reply to *Rummel v. Estelle*

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SALVAGING PROPORTIONATE PRISON SENTENCING: A REPLY TO *RUMMEL V. ESTELLE*

American prison sentences as authorized by statute are among the longest in the world.[1] Courts have used the eighth amendment's proscription of "cruel and unusual punishments,"[2] however, to mitigate the harshness of excessively long sentences, on the theory that the amendment prohibits prison terms grossly disproportionate to the severity of the crime.[3] For decades, the Supreme Court has recognized this disproportionality limitation on criminal sanctions,[4] and, until recently, permitted eighth amendment challenges to punishment regardless of the crime involved or penalty imposed.[5] In *Rummel v. Estelle*,[6] though, the

1. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 57 (1968).

2. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. *See, e.g.*, Downey v. Perini, 518 F.2d 1288 (6th Cir.) (30- to 60-year sentence for marijuana possession), *vacated on other grounds*, 423 U.S. 993 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (life sentence imposed under state recidivism statute following defendant's conviction for three separate offenses: writing a $50 check on insufficient funds, transporting $140 in forged checks across state lines, and perjury), *cert. denied*, 415 U.S. 938 (1974); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978) (48- to 50-year sentence imposed following conviction for safecracking); Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977) (40-year sentence imposed following conviction for possession with intent to distribute, and distribution of, less than nine ounces of marijuana), *rev'd sub nom.* Hutto v. Davis, 102 S. Ct. 703 (1982) (per curiam); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (20-year minimum sentence imposed following conviction for sale of marijuana); *see also In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (one-year-to-life sentence imposed following second conviction for indecent exposure, relying on California Constitution).

4. *See* Weems v. United States, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime should be graduated and proportioned to offense"); *accord* Coker v. Georgia, 433 U.S. 584, 592 (1977) (a penalty violates the eighth amendment if "grossly out of proportion to the severity of the crime"). For a discussion of the proportionality principle as a constitutional limitation on punishment, see Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978); Wheeler, *Towards a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

5. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (challenging death sentence for the rape of an adult woman); Gregg v. Georgia, 428 U.S. 153 (1976) (reviewing imposition of death penalty for murder); Weems v. United States, 217 U.S. 349 (1910) (eighth amend-

Court suggested that proportionality principles do not limit the permissible length of prison terms levied on felons, because "the length of the sentence actually imposed is purely a matter of legislative prerogative."[7] The Court in *Rummel*, therefore, shielded statutorily imposed prison sentences from constitutional scrutiny in all but the most egregious cases.[8]

Although the reasoning of *Rummel* will thus be dispositive of eighth amendment challenges to sentence length brought under the federal constitution, state courts remain free to depart from the Supreme Court's analysis in interpreting state constitutional corollaries to the federal proscription of cruel and unusual punishment. Indeed, several state courts already have rejected the *Rummel* approach in construing the scope of protection against severe punishment afforded by their state constitutions.[9] Accordingly, the arguments advanced in *Rummel* demand critical attention. Part I of this Note provides a capsule of the Court's holding in *Rummel*. Part II argues, contrary to *Rummel*, that precedential support can be mustered to support eighth amendment review of sentence length. Finally, part III discusses the continued viability of the proportionality test as a vehicle for assessing challenges to the length of imprisonment, and discounts the concerns voiced in *Rummel* regarding the difficulty of judicial review of legislative sentencing decisions.

I. THE SUPREME COURT'S REJECTION OF PROPORTIONALITY REVIEW

In *Rummel v. Estelle*, the Supreme Court confronted the troubling question of whether a legislatively mandated life sentence could be found violative of the eighth amendment's proscription of cruel and unusual punishment. William Rummel had committed a series of felonious property offenses in Texas involving less than $230.[10] After being convicted of his third fel-

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ment attack upon punishment comprising 12 years at hard labor plus the loss of many civil rights for the crime of falsifying a public document).

6. 445 U.S. 263 (1980).

7. *Id.* at 274.

8. *See infra* notes 20-23 and accompanying text.

9. *See, e.g.*, State v. McDaniel, 228 Kan. 172, 612 P.2d 123 (1980) (sentence of 5 to 20 years for aggravated robbery); Cepulonis v. Commonwealth, 427 N.E.2d 17 (Mass. 1981) (sentence of 40 to 50 years for possession of a machine gun); State v. Fain, 94 Wash. 387, 617 P.2d 720 (1980) (life sentence under habitual offender statute where underlying convictions involved use of fraud to obtain less than $470).

10. Rummel was convicted in 1964 of fraudulently using a credit card to obtain $80

ony, for theft by false pretext,[11] Rummel was sentenced to life imprisonment under the Texas "habitual offender" statute.[12] Following the affirmance of his conviction in state court,[13] Rummel pursued habeas corpus review in the federal courts, alleging that his sentence constituted cruel and unusual punishment. Rummel premised his claim for habeas relief not upon the invalidity of the Texas habitual offender statute — which had previously been found constitutional[14] — but rather upon the argument that the statute as applied to him[15] violated the eighth amendment because the sentence was grossly disproportionate to his crime.[16]

The Supreme Court, affirming the lower courts,[17] rejected Rummel's contentions, finding the eighth amendment propor-

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worth of goods and was sentenced to three years in the state penitentiary. Five years later, he was sentenced to four years in prison for passing a forged check for $28.36. Rummel was found guilty a third time in 1973, for the felony of obtaining $120.75 by false pretenses. 445 U.S. at 265-66. Ironically, Rummel was convicted of a fourth felony concurrently with being sentenced to life imprisonment under the provisions of the Texas habitual offender statute. *See* Rummel v. Estelle, 587 F.2d 651, 659 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980).

11. Subsequent to Rummel's felony conviction for theft by false pretext, Texas reclassified the offense as a misdemeanor. *See* TEX. PENAL CODE ANN. § 31.03(d)(3) (Supp. 1980); Rummel v. Estelle, 445 U.S. 263, 295 (1980) (Powell, J., dissenting).

12. The statute provided: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." TEX. PENAL CODE ANN. art. 63 (Vernon 1962) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974)). For a general discussion of recidivist statutes, see Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975).

13. *See* Rummel v. State, 509 S.W.2d 630 (Tex. Crim. App. 1974).

14. Spencer v. Texas, 385 U.S. 554 (1967).

15. The Supreme Court has held that a facially valid statute may be violative of the Constitution when applied in a particular case. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963) (state statute prohibiting breach of the peace violated the first amendment when invoked against participants in a demonstration).

Appellate courts occasionally have overturned statutorily permissible sentences on the basis of an abuse of discretion by the sentencing judge. *See, e.g.*, Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) (vacating as an abuse of discretion a five-year sentence imposed for refusing induction into the military service). Rummel, however, could not allege an abuse of discretion by the sentencing judge, because the life sentence was mandated by statute.

16. Rummel was not sentenced to life imprisonment for obtaining money by false pretenses; under Texas law, the maximum penalty for that offense was 10 years imprisonment. TEX. PENAL CODE ANN. art. 1421 (repealed 1973), *reprinted in* TEX. PENAL CODE ANN. app. (Vernon 1974). Rather, the life sentence stemmed from the provisions of the Texas habitual offender statute. *See supra* note 12.

17. The federal district court had denied Rummel's petition for habeas relief without holding a hearing, but was reversed by a divided circuit court panel. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978). The Fifth Circuit Court of Appeals, however, reheard Rummel's case *en banc* and affirmed the district court's denial of relief. Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978).

tionality principle[18] inapplicable to the punishment Texas had imposed.[19] The Court thereby had established a broad-based principle. Decisions regarding lengths of felony prison sentences would be entrusted to the discretion of the legislature,[20] with the exception of "exceedingly rare" cases[21] such as the imposition of a life sentence for the felony of overtime parking[22] — which the Court acknowledged but made no attempt to define.[23]

The Court's conclusion that it would eschew proportionality review of prison terms imposed on felons stemmed from two distinct propositions. First, the Court did not find precedential support for Rummel's position that eighth amendment proportionality principles were meant to apply to the length of prison sentences.[24] Second, the Court reasoned that assessing the pro-

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18. *See supra* notes 2-5 and accompanying text.

19. The Court split 5-4. Justice Rehnquist wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, White, and Blackmun. Justice Stewart also filed a concurring opinion. Justice Powell, dissenting, was joined by Justices Brennan, Marshall, and Stevens.

20. *See* 445 U.S. at 274 ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.").

21. *See* Hutto v. Davis, 102 S. Ct. 703, 705 (1982) (per curiam) ("*Rummel* stands for the proposition that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare'.") (quoting *Rummel*, 445 U.S. at 272). In several cases decided before *Davis*, state and lower federal courts had adopted a similar view of *Rummel's* meaning. *See, e.g.*, Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980) (length of a felony prison sentence reviewable only on "extreme facts"), *cert. denied*, 451 U.S. 939 (1981); *accord* Hayes v. Bordenkircher, 621 F.2d 846 (6th Cir. 1980); State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980). Other courts, when faced with a statute mandating a particular punishment, have found *Rummel* to dictate that any deviation from the statutory penalty is a matter for the legislature. *See* Comstock v. State, 406 N.E.2d 1164 (Ind. 1980) (recidivist statute); State v. Jones, 298 N.W.2d 296 (Iowa 1980) (statute governing consecutive sentences).

22. 445 U.S. at 274 n.11.

23. Thus, it is impossible to predict how the Court will react to particular cases that might be considered within the "exceedingly rare" category. Indeed, Hutto v. Davis, 102 S. Ct. 703 (1982) (per curiam), the first Supreme Court case decided under *Rummel*, provides no insight into this problem; as the dissent observed, the Court made no attempt to analyze why the defendant's case was not "exceedingly rare." *Id.* at 710 (Brennan, J., dissenting). The dissenting Justices, however, argued that three features placed the case in that category. Defendant Davis had been convicted and sentenced to two consecutive 20-year terms for possession with intent to distribute and distribution of marijuana, the evidence consisting of less than nine ounces of marijuana found in his home. The dissent found Davis' situation "exceedingly rare" because his sentence was "in cruel and painful excess of the punishments imposed by the Virginia courts" for similar offenses. *Id.* at 710-11. Moreover, the prosecutor conceded that Davis's sentence "represent[ed] a 'grave disparity in sentencing' and that the continued incarceration of Davis '[was] grossly unjust'." *Id.* at 711. Finally, in 1979, six years after Davis's conviction, the Virginia legislature reduced the maximum sentence with respect to each of Davis's offenses from 40 years to 10 years. *Id.*

24. 445 U.S. at 272-77.

portionality of prison terms was fraught with such difficulties — because too subjective or too complex[25] or too much an interference with state autonomy[26] — as to counsel against judicial review of decisions essentially within the legislative prerogative. Yet these propositions appear flawed upon closer study; detailed examination of the two basic strands of the Court's analysis in *Rummel*, to which this Note now turns, reveals the flaws of the decision and suggests the continued viability of proportionality review of felony prison sentences.

II. SUPREME COURT PRECEDENT APPLYING PROPORTIONALITY STANDARDS

A. *Challenges to Sentence Length* — Weems v. United States

In the nineteenth century, the Supreme Court entertained eighth amendment challenges only in death penalty cases.[27] In *Weems v. United States*,[28] however, the Court for the first time applied eighth amendment analysis to a non-capital case. In *Weems*, the defendant had been convicted in the Philippines[29] of falsifying a public document.[30] The mandatory punishment under Philippine law, *cadena temporal*, involved a composite of

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25. *Id.* at 279-81.

26. *Id.* at 282-84.

27. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130 (1879) (finding execution by public shooting to be constitutional). The nineteenth century cases focused not upon the constitutionality of the death penalty itself, but rather upon the legality of the execution *method*. During this period, the Court had barred only torture or other barbarous penalties under the eighth amendment. *See, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."). For the view that the English roots of the eighth amendment indicate a greater concern for excessive rather than barbarous punishments, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

28. 217 U.S. 349 (1910). The historical background of *Weems* is discussed extensively in Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975).

29. At the time, the Philippines was a United States territory and thus came within the jurisdiction of the Supreme Court.

30. The offense embraced any entry of false information in a public record, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." 217 U.S. at 365.

penalties. Confinement was for a minimum of twelve years, during which the prisoner would be chained and required to do hard labor. In addition, a variety of accessory penalties were imposed: the prisoner lost all marital, parental, and property rights during confinement, and remained under surveillance of a criminal magistrate for life.[31] The Supreme Court agreed with the defendant's argument that imposition of *cadena temporal* would be grossly disproportionate to the offense of falsifying a public document and declared the sentence unconstitutional as a violation of the eighth amendment.[32]

Rummel attempted to draw upon *Weems* as support for his contention that a prison sentence could be found violative of the eighth amendment proportionality principle, arguing that *cadena temporal* had been found unconstitutional in part because the length of the prison term alone was excessive.[33] In effect, Rummel depicted *Weems* as establishing that a disproportionately long prison sentence — twelve years confinement for the falsification of a document — could itself, without more, constitute cruel and unusual punishment.

The *Rummel* majority rejected this reading, however, observing that *Weems* could not "be applied without regard to its peculiar facts."[34] In the Court's view, *Weems* held merely that the prison term and accessory penalties considered in combination — not separately — imposed cruel and unusual punishment.[35]

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31. *Id.* at 364-66.

32. *Id.* at 377-78.

33. *Rummel*, 445 U.S. at 273 ("Rummel argues that the length of Weems' imprisonment was, by itself, a basis for the Court's decision").

34. These "peculiar facts" were "the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment of *cadena temporal*." *Id.* at 274.

By thus restricting *Weems* to its facts, the Court had departed from a series of decisions construing *Weems* as support for the general proposition that punishment would be reviewed under eighth amendment proportionality principles. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 393 (1972) (Burger, C.J., dissenting) ("[*Weems*] is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime . . . ."); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978); Coker v. Georgia, 433 U.S. 584, 592 (1977); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Estelle v. Gamble, 429 U.S. 97, 103 n.7 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976).

35. *Rummel*, 445 U.S. at 273 (*Weems* "consistently referred jointly to the length of imprisonment and its 'accessories' or 'accompaniments'.").

To buttress its point that *Weems* had considered the prison term and accessory punishments in tandem, the *Rummel* majority observed that the *Weems* Court had expressly rejected the argument that "the provision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application." 445 U.S. at 273-74 (quoting *Weems*, 217 U.S. at 381-82). But it does not necessarily follow that the *Weems* Court did not consider the

Rummel thus identified the accessories as essential to the constitutional defect in *cadena temporal*,[36] concluding that *Weems* had not found the prison sentence alone to be an eighth amendment violation.[37]

This reading of *Weems*, however, seems far too narrow,[38] and disregards clear language to the contrary. In striking down the statute imposing *cadena temporal* for falsification of public documents, the *Weems* Court found the penalty to be "cruel in its excess of imprisonment *and* that which follows and accompanies imprisonment."[39] In this passage, therefore, the Court condemned *cadena temporal* because it found the penalty's component elements — separately stated — to constitute cruel and unusual punishment. Furthermore, the Court observed that the statute's "punishments come under the condemnation of the bill of rights, both on account of their degree and kind."[40] The refer-

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combined punishments of *cadena temporal* individually, merely because it recognized that Philippine law "unites the penalties of *cadena temporal*." The Court might well have considered, and seemingly did consider, the elements of *cadena temporal* separately for purposes of eighth amendment *analysis*, even though recognizing it had no power to fashion a *remedy* for the constitutional violation that distinguished the accessory penalties from the punishment. If the Court, in disposing of the case, had separated the elements of *cadena temporal*, it would have abridged the manifest intent of the Philippine legislature, which had mandated both the accessory sanctions and the prison term as punishment for Weems's offense. This legislative intent, however, had no bearing on whether the Court approached the elements of *cadena temporal* as analytically distinct punishments. The *Weems* Court simply found itself powerless to fashion a criminal penalty — such as imprisonment alone — unauthorized by the statute. *See Weems*, 217 U.S. at 381-82 (" '[T]he general rule [is] that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void . . . .' ") (quoting *In re* Graham, 138 U.S. 461, 462 (1891)). On this theory, therefore, the Court, when confronted with an unconstitutional composite punishment, had no alternative but to hold the entire penalty unconstitutional, rather than merely one component.

36. *See* 445 U.S. at 274.

37. *Id.* at 273 ("Although Rummel argues that the length of Weems' imprisonment was, by itself, a basis for the Court's decision, the Court's opinion does not support such a simple conclusion.").

38. The *Rummel* majority is not alone, though, in viewing *Weems* as based upon a combination of punishments. *See* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964) ("it was the combination of an excessive but conventional mode of punishment with a good deal of laid-on unpleasantness offensive for its novelty as well as its severity that supported the characterization of Weems' punishment as cruel and unusual"). *But see* 38 WASH. & LEE L. REV. 243, 251 (1981) ("the [*Weems*] Court recognized that length of punishment alone can constitute cruel and unusual punishment").

39. 217 U.S. at 377 (emphasis added). The Court has never directly decided whether "unusual" is distinct from "cruel" for eighth amendment purposes. *See* Furman v. Georgia, 408 U.S. 238, 331 (1972) (Marshall, J., concurring); Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958).

40. 217 U.S. at 377.

ence to plural "punishments" strongly indicates that the Court considered the constitutionality of the individual elements of *cadena temporal* and found each constituent punishment — including the excessively harsh prison sentence — to be violative of the eighth amendment. The *Rummel* majority, therefore, misread *Weems*,[41] which indeed represents good precedent for the proposition Rummel sought to establish: a prison sentence grossly disproportionate to the severity of the offense violates the eighth amendment.[42]

B. Proportionality and the Death Penalty Cases

Three major death penalty cases of the 1970's[43] firmly estab-

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41. *Rummel* also ignored Hutto v. Finney, 437 U.S. 678 (1978), which suggested that the length of incarceration may offend the Constitution. Regarding a prisoner's confinement in isolation, the *Hutto* Court commented: "[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'gruel' might be tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87.

42. Additional language in *Weems* provides further support for the conclusion that the Court ruled on the constitutionality of the prison sentence alone. For instance, the issue raised by the defendant on appeal related solely to whether 15 years imprisonment was cruel and unusual punishment for falsifying a public record. 217 U.S. at 362. Furthermore, the Court, in its review of eighth amendment case law, cited McDonald v. Commonwealth, 173 Mass. 322 (1899), which recognized that a disproportionately long prison sentence might violate the Constitution, 217 U.S. at 368, and noted Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892), in which he remarked that the eighth amendment prohibited "all punishments which by their excessive length or severity are greatly disproportionate to the offences charged." *See also* Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973) ("In *Weems*, the Court noticed, with apparent approval, that the highest state court of Massachusetts had previously conceded the possibility that 'punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment'.") (quoting *Weems*, 217 U.S. at 368), *cert. denied*, 415 U.S. 983 (1974).

43. *See* Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). *See generally* Radin, *supra* note 4.

In *Furman*, with each Justice filing a separate opinion, the Court struck down Georgia and Texas death penalty statutes as violative of the eighth amendment. Several of the Justices focused upon the death penalty as administered in concluding that these statutes inflicted cruel and unusual punishment: Justice Douglas felt the death penalty was applied discriminatorily against a specific class of people; Justice Stewart found that the penalty was administered so infrequently as to be "capricious"; and Justice White reasoned that the infrequency of executions made the death penalty ineffective in deterring crime. In contrast, Justices Marshall and Brennan found the death penalty to be unconstitutional per se. In the view of Justice Marshall, the death penalty was unnecessarily cruel because its admittedly legitimate ends could be achieved by less severe sanctions. Justice Brennan — in addition to voicing the concerns of inconsistent administration and the availability of less drastic alternatives to achieve the same objective — characterized the death penalty as not comporting with human dignity, because he found execution so severe as to degrade the prisoner.

lished that the eighth amendment prohibits penalties grossly disproportionate to the severity of the crime.[44] In addition to *Weems*, Rummel relied on the death penalty cases to show that the Court could find the prison term imposed upon him unconstitutional because disproportionate to his crime.[45] For two reasons, however, the Court refused to extend these precedents to eighth amendment attacks on sentence length.

1. Distinguishing the death penalty from imprisonment— The Court first found the principles announced in the death penalty cases to be of "limited assistance" to Rummel because "a sentence of death differs in kind from any sentence of imprisonment, no matter how long . . . ."[46] The majority relied upon the distinctions between the death penalty and imprisonment enunciated in *Furman v. Georgia*,[47] where Justice Stewart said that death constituted a "unique" penalty because it (1) is irrevocable, (2) necessarily rejects rehabilitation of the convict as a basic goal of criminal justice, and (3) renounces all that is embodied in society's concept of humanity.[48]

The Court's analysis, however was unresponsive to the ques-

In *Gregg*, the Court upheld the death penalty for murder. Justices Stewart, Powell, and Stevens concluded that, because at least 35 states had reenacted the death penalty after *Furman*, capital punishment should be considered neither excessively cruel nor disproportionate punishment in all circumstances, and should be recognized as serving valid penological purposes. Justice White, joined by Chief Justice Burger and Justice Rehnquist, found that the Georgia statute met the *Furman* test because it was not administered in a discriminatory, standardless, or rare fashion. Justice Blackmun concurred in the judgment without opinion, while Justices Brennan and Marshall retained their views expressed in *Furman*.

The Court in *Coker* considered the constitutionality of imposing the death penalty for the rape of an adult woman. Justice White, joined by Justices Stewart, Blackmun, and Stevens, found the death penalty grossly disproportionate for the crime of rape, in violation of the eighth amendment. Justices Brennan and Marshall concurred in the judgment, citing their positions in *Gregg* that the death penalty constitutes cruel and unusual punishment in all circumstances. Justice Powell agreed that the death penalty would be disproportionate to the crime of rape where, as in *Coker*, there was no excessive brutality or lasting harm to the victim, but disagreed with the plurality that the death penalty would always be unconstitutional when imposed for the crime of raping an adult woman.

44. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.").

45. *See Rummel*, 445 U.S. at 272 ("Rummel cites these . . . opinions dealing with capital punishment as compelling the conclusion that his sentence is disproportionate to his offenses.").

46. *Id.*

47. 408 U.S. 238 (1972).

48. *Id.* at 306 (Stewart J., concurring).

tion presented by Rummel. Although Justice Stewart had indeed articulated salient features of the death penalty, for the purposes of eighth amendment proportionality analysis these features fail to distinguish the capital cases from cases involving excessive prison sentences. First, *Furman* identified irrevocability as a factor making the death penalty unique. But, in fact, both the death penalty and a prison sentence are, in the relevant sense of the term, "irrevocable." The death penalty is irrevocable not because once pronounced it can never be rescinded; the sentence can be commuted to life imprisonment, for example, before the day of execution. Rather, the death penalty is irrevocable because once carried out it cannot be voided. A prison sentence is similarly irrevocable: a twenty-year sentence may be shortened by parole, for instance, before being fully served. Once the prisoner has served the term, however, the state can neither shorten the sentence nor return the years of imprisonment. Therefore, a prison sentence already served is fully as "irrevocable" as a death warrant already executed.

Justice Stewart in *Furman* identified a second "unique" element of the death penalty: it alone denies rehabilitation as an objective of the criminal justice system. Yet this distinction, while correct, lacks constitutional significance. Whether capital punishment serves a rehabilitative purpose has never been dispositive of the eighth amendment issue. For example, the death penalty, never rehabilitative, has been upheld as a constitutional punishment for murder,[49] but cruel and unusual punishment when imposed on a rapist.[50] Indeed, the Constitution does not require that a criminal penalty have a particular penological goal, rehabilitative or otherwise. While the Constitution requires punishment to have some penological objective,[51] rehabilitation is only one of several goals that would satisfy this requirement.[52] On this basis, therefore, imprisonment and the death penalty cannot be distinguished; both serve valid, constitutional penological goals.

Finally, the third *Furman* factor relied upon by the Court in *Rummel* to distinguish the death penalty cases was that only capital punishment renounces the prisoner's humanity. Upon

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49. Gregg v. Georgia, 428 U.S. 153 (1976).

50. Coker v. Georgia, 433 U.S. 584 (1977).

51. *See id.* at 592. This is not the only constitutional requirement; the eighth amendment also forbids penalties grossly disproportionate to the severity of the crime. *Id.*

52. The purposes of criminal sanction can be categorized as prevention, restraint, rehabilitation, education, and retribution. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON THE CRIMINAL LAW § 5 (1972).

closer examination, however, this factor appears to be a hollow means upon which to draw a distinction; in various decisions, a majority of the Justices seemingly have held that the death penalty per se does not deny the condemned person's humanity.[53] Thus, the third factor identified by the *Rummel* Court for differentiating capital punishment from imprisonment simply cannot withstand scrutiny.

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53. Justice Stewart seemingly derived the notion that the death penalty renounces humanity from Justice Brennan's concurrence in Furman v. Georgia, 408 U.S. 238 (1972). Justice Stewart's concurrence in *Furman*, however, did not rely upon the argument regarding renunciation of humanity; he classified this factor as being one of the reasons why "at least two of [his] Brothers . . . concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances," *id.* at 306, and then proceeded to concur on the basis that the death penalty had been "wantonly . . . and freakishly imposed," *id.* at 310.

For Justice Brennan, the eighth amendment commands fundamentally that punishment "comport with human dignity." *Id.* at 270. This means, in part, that the punishment must not be so severe that it "reflect[s] the attitude that the person punished is not entitled to recognition as a fellow human being." *Id.* at 273; *cf. id.* at 272-73 ("The true significance of [constitutionally prohibited barbaric] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded."). A punishment's denial of the prisoner's humanity, therefore may result solely from its severity. Justice Brennan found that "[d]eath is today an unusually severe punishment, severe in its pain, in its finality, and in its enormity." *Id.* at 287. Because of the severity of capital punishment, he concluded, "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.* at 291; *see also id.* at 290 ("The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.").

Several death penalty cases indicate, however, that at least five Justices would disagree with Justice Brennan's conclusion that the severity of the penalty renders capital punishment a denial of the prisoner's humanity. In Gregg v. Georgia, 428 U.S. 153 (1976), Justices Stewart, Powell, and Stevens held that the death penalty is not excessively severe. They explicitly recognized that the eighth amendment requires that a "penalty . . . must accord with 'the dignity of a man'," *id.* at 173, while agreeing that the death penalty is uniquely severe, *id.* at 187. Nevertheless, they refused to conclude that capital punishment is impermissible in all circumstances, noting instead that "[i]t is an extreme sanction, suitable to the most extreme of crimes." *Id.* By implication, therefore, Justices Stewart, Powell, and Stevens disagreed with Justice Brennan that the severity of the death penalty alone denies the humanity or dignity of the condemned person.

Two other Justices have reached a similar conclusion. Relying on his dissent in Roberts v. Louisiana, 428 U.S. 325 (1976) (finding a mandatory death penalty statute to be cruel and unusual punishment), Justice White concurred in *Gregg*, reasoning that the death penalty is not always unconstitutional. *See* 428 U.S. at 226. In his *Roberts* dissent, in which Chief Justice Burger, and Justices Blackmun and Rehnquist joined, Justice White concluded that the death penalty could not always be characterized as being so excessively severe as to violate the Constitution. 428 U.S. at 353. Although the *Roberts* dissent was not founded on the dignity-of-man theory, Justices White and Blackmun appeared to embrace this theory in Coker v. Georgia, 433 U.S. 584, 591-92 (1977) (opinion of White, J.), which found the death penalty unconstitutional as an excessive punishment for the rape of an adult woman. In light of *Coker*, these two *Roberts* dissenters seemingly believe that the death penalty is not so inherently severe as to deny the condemned person's dignity. Consequently, at least five Justices would disagree with Justice Brennan that the death penalty inherently renounces the prisoner's humanity.

2. Drawing a "bright line" for proportionality analysis— Reference to the features compiled by Justice Stewart in *Furman*, therefore, does not provide a satisfactory basis for distinguishing the application of proportionality principles in the death penalty cases from cases seeking judicial review of excessively harsh prison sentences. The *Rummel* Court, however, alluded to a further argument that could differentiate capital punishment cases from those involving imprisonment. As the Court phrased it, a "bright line" can be drawn between the death penalty and all other punishments;[54] no similarly sharp distinction exists between varying terms of imprisonment. The Court made clear its desire to avoid a "slippery slope" along which principled lines could not be drawn,[55] thus limiting itself to reviewing the proportionality of punishment only in an area seemingly susceptible of clear constitutional distinction.[56] The Court perceived attempts by the judiciary to review prison sentences as impermissible, or at least ill-advised, "intrusion[s] into the basic line-drawing process that is preeminently the province of the legislature . . . ."[57]

This argument may be attacked on two fronts. First, although the death penalty differs in kind from other punishments — because it alone involves loss of life — this is irrelevant for purposes of applying the proportionality principle. Eighth amendment proportionality analysis compares the *severity* of punishment and crime. Thus, the capital cases involving eighth amendment challenges that relied on the proportionality principle[58] assessed the severity of the penalty — rather than the kind of punishment — in relation to the offense involved. In *Coker v. Georgia*,[59] for example, the Court held in effect that death was too severe a punishment for the rape of an adult woman. For purposes of applying the proportionality principle, therefore, the death penalty differs from other punishments only in its degree of severity; less severe punishments, such as prison sentences, need not be excluded from consideration.

Second, the line-drawing problem inherent in constitutional

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54. *See* 445 U.S. at 275.

55. For a discussion of "slippery slope" considerations, see Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 417-19 (1980).

56. *But see supra* notes 46-53 and accompanying text (arguing that no distinction exists, for eighth amendment proportionality purposes, between the death penalty and lesser criminal sanctions).

57. 445 U.S. at 275.

58. *See* Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

59. 433 U.S. 584 (1977).

review of prison terms — but not the death penalty — does not justify excluding imprisonment from proportionality consideration. Although arbitrary distinctions between differing terms of years may be the inevitable result of judicial review of prison sentences, the Court nonetheless can draw lines which afford some measure of eighth amendment protection for felons punished by imprisonment. An analogy can be drawn concerning the right to jury trial,[60] where the Supreme Court recognized the need to draw arguably arbitrary lines. Having previously upheld a criminal conviction returned by a unanimous six-member jury,[61] the Court refused to sustain a unanimous five-member jury conviction, even though a majority admitted it could not discern a clear distinction between five- and six-person juries.[62] Clearly, a refusal to draw an arbitrary line between varying jury sizes could lead to erosion of the right to jury trial. Similarly, the Court should not be deterred from distinguishing between constitutional and unconstitutional terms of years — if the alternative is to remove all prison sentences from eighth amendment scrutiny.

Moreover, even accepting the premise that an arbitrary constitutional line between sentence lengths is unacceptable, the proportionality principle need not be abandoned altogether as invariably producing arbitrary results.[63] Although some proportionality judgments may be arbitrary, this will not necessarily be true of all such judgments. For example, a court, upon consideration of various factors,[64] might find forty years imprisonment to be a punishment grossly disproportionate to the offense of stealing a $100 coat. These same factors, however, may not tell the

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60. The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

61. Williams v. Florida, 399 U.S. 78 (1970).

62. Ballew v. Georgia, 435 U.S. 223, 239 (1978). In Burch v. Louisiana, 441 U.S. 130 (1979), the Court considered a state statute permitting conviction by a six-member jury on a 5-1 vote. The Court had previously upheld convictions by a unanimous six-member jury, Williams v. Florida, 399 U.S. 78 (1970), and by a non-unanimous twelve-member jury, *see* Apodaca v. Oregon, 406 U.S. 404 (1972) (finding convictions on 11-1 and 10-2 jury votes constitutional). The Court in *Burch* held unconstitutional the non-unanimous vote of a six-member jury. Speaking for the Court, Justice Rehnquist noted that "lines must be drawn somewhere if the substance of the jury trial right is to be preserved." 441 U.S. at 137.

63. *See* 445 U.S. at 275-76 ("to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen $5,000, $50,000, or $500,000, rather than . . . $120.75 . . ., is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts").

64. Before *Rummel* was decided, the state and lower federal courts had identified several of these factors. *See infra* text accompanying notes 69-71.

court whether a one-year difference in sentences — between, for instance, nine and ten years — makes a constitutional difference. Faced with this decision, the court may find, arbitrarily, that a nine- but not a ten-year sentence is constitutionally permissible. Yet the holding that a forty-year term for the theft imposed cruel and unusual punishment would remain a principled decision, even if the court were forced into an arbitrary line on the more difficult case.[65] The arbitrariness of some proportionality decisions does not infect all others — and does not compel wholesale abandonment of the proportionality doctrine.

Thus, the notion that the courts should engage in eighth amendment proportionality review of criminal sanctions appears equally applicable to the death penalty and to prison sentences. Indeed, nothing in the capital punishment cases suggested that the principles announced were not of general application;[66] the precedent seemingly provided authority for the Court to engage in eighth amendment review of sentence length.

III. THE PROPORTIONALITY TEST OF SENTENCE LENGTH

Aside from the question of whether Rummel could muster precedential support for his position, the Court advanced a second major objection to judicial review of prison terms,[67] focusing on the flaws inherent in applying eighth amendment proportion-

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65. The fears that proportionality review of prison sentences would deteriorate into a wholly arbitrary process may in fact be unfounded. Dissenting in *Rummel*, Justice Powell observed that the United States Court of Appeals for the Fourth Circuit — the last bastion of proportionality oversight of sentence length — had managed workable standards for assessing whether prison terms violated the eighth amendment, without becoming hopelessly mired in indiscriminate linedrawing. *See* 445 U.S. at 304-06 (Powell, J., dissenting).

66. The mode of analysis in Gregg v. Georgia, 428 U.S. 153 (1976), is illustrative. The Court first isolated general principles of eighth amendment analysis and then applied these principles to the death penalty:

> In the discussion to this point we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider *specifically* whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution.

Id. at 176 (emphasis added). The *Rummel* dissent also noted that the "principle of disproportionality has been acknowledged to apply to both capital and noncapital sentences." 445 U.S. at 293 (Powell, J., dissenting).

67. The *Rummel* Court did not expressly address itself to the proportionality test per se. But the Court clearly responded to the arguments advanced by Rummel that were intended to show the disproportionality of his life prison sentence. *See* 445 U.S. at 274-75, 279-81, 282-84; *see also* Hutto v. Davis, 102 S. Ct. 705 n.2 (1982) (per curiam) (describing *Rummel* as disapproving of each factor of the proportionality test).

ality principles to assess the constitutionality of specific sentences. Before *Rummel*, eighth amendment challenges to felony prison terms, arguing that the punishment was grossly disproportionate to the severity of the crime, had been considered frequently[68] and sustained occasionally in the state and lower federal courts.[69] These courts had refined the proportionality principle into a three-part test,[70] assessing whether a prison term violated the eighth amendment by considering (1) the nature and gravity of the offense, (2) a comparison of the punishment imposed with penalties for other crimes in the jurisdiction, and (3) a comparison of the punishment imposed with penalties for the same crime in other jurisdictions.[71] Rummel argued that these factors demonstrated the disproportionality of his prison sentence. But the Court found the test an inappropriate vehicle for considering whether terms of imprisonment transgressed eighth amendment limits on punishment. The Court concluded that the test relied too heavily upon subjective considerations best left to the legislature,[72] and that it entailed complex judgments[73] intruding heavily upon state autonomy in matters of

68. *See, e.g.*, United States v. Faleafine, 492 F.2d 18 (9th Cir. 1974) (50-year sentence for kidnapping does not constitute cruel and unusual punishment); McDonald v. Arkansas, 501 F.2d 385 (8th Cir.) (eighth amendment not violated by a 30-year sentence imposed for forcible rape), *cert. denied*, 419 U.S. 1004 (1974); Yeager v. Estelle, 489 F.2d 276 (5th Cir. 1973) (per curiam) (500-year prison term for murder did not inflict cruel and unusual punishment), *cert. denied*, 416 U.S. 908 (1974); Guerro v. Fitzpatrick, 436 F.2d 378 (1st Cir. 1971) (per curiam) (three consecutive 9- to 10-year terms for the offense of receiving stolen motor vehicles did not violate the eighth amendment); United States v. Collins, 432 F.2d 1136 (7th Cir. 1970) (8-year prison sentence for the unlawful transportation of stolen firearms was not cruel and unusual punishment), *cert. denied*, 400 U.S. 1011 (1971); United States v. Overton, 359 F.2d 28 (4th Cir. 1966) (eighth amendment was not violated by a 3-month sentence imposed for the willful failure to file federal income tax returns); *see also* Annot., 33 A.L.R.3d 335 (1970).

69. *See* cases cited *supra* note 3.

70. *See generally* Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); White, *Disproportionality and the Death Penalty: Death as Punishment for Rape*, 38 U. PITT. L. REV. 145, 150-58 (1977); Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119 (1979).

71. The test is intended to be cumulative, with each element checking the accuracy of the others. *See* Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

72. 445 U.S. at 274-75. Ironically, courts had employed the proportionality test to minimize subjectivity in the judicial process. *See, e.g.*, Carmona v. Ward, 576 F.2d 405, 409 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979); Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973) ("there are several objective factors which are useful in determining whether the sentence in this case is constitutionally disproportionate"), *cert. denied*, 415 U.S. 983 (1974). One court has suggested that the proportionality test improves upon the "subjective evaluation which looks to the extent to which the conscience of the court is shocked by punishments imposed." People v. Broadie, 37 N.Y.2d 100, 111, 332 N.E.2d 338, 342, 371 N.Y.S.2d 471, 476, *cert. denied*, 423 U.S. 950 (1975).

73. 445 U.S. at 279-81.

criminal justice.[74] In fact, however, the Court's objections to the proportionality test are not persuasive; as the following analysis demonstrates, courts interpreting state constitutional prohibitions on cruel and unusual punishment should not be dissuaded from applying proportionality analysis by the concerns advanced in *Rummel.*

A. The Gravity of the Offense

As a first proposition, a court considering whether a prison term imposes cruel and unusual punishment must assess the gravity of the offense; a harsh penalty for a relatively trivial offense may suggest disproportionality. In their efforts to evaluate objectively the gravity of the offense at issue, some courts have considered whether the crime was violent or otherwise against the person[75] — in effect distinguishing the gravity of crimes by the presence of violence. Indeed, Rummel urged that his crimes were "petty" because none were against the person.[76] The Court rejected this approach, finding violence to be inadequate as an indication of the gravity of an offense.[77] For instance, noted the Court, a corporate officer accepting a bribe would commit a serious, albeit nonviolent, crime.[78]

The Court properly criticized the approach of those courts employing violence as a proxy for the gravity of offenses. The proportionality test itself, however, remains intact; several courts have measured the gravity of a crime, not by reference to the violence involved, but by considering the degree of harm the criminal act causes society.[79] Under this approach, the gravity of

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74. *Id.* at 282-84.

75. *See, e.g.*, Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973) ("In assessing the nature and gravity of an offense, courts have repeatedly emphasized the element of violence and danger to the person."), *cert. denied*, 415 U.S. 983 (1974).

76. *Rummel*, 445 U.S. at 275.

77. *Id.* at 275, 282 n.27.

78. *Id.* at 275.

79. *See, e.g.*, People v. Broadie, 37 N.Y.2d 100, 112, 332 N.E.2d 338, 342, 371 N.Y.S.2d 471, 476 ("In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society."), *cert. denied*, 423 U.S. 950 (1975); *In re* Lynch, 8 Cal. 3d 410, 431, 503 P.2d 921, 935, 105 Cal. Rptr. 217, 231 (1972) (the annoyance caused by indecent exposure "is not a sufficiently grave danger to society to warrant the heavy punishment of a life-maximum sentence"); *see also* Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979).

Although these courts have not discussed the point, what constitutes "harm" to society may vary among crimes; for instance, the harm caused by passing a bad check differs from the harm caused by murder. The distinctions flow, of course, from the varied socie-

an offense turns on the injury inflicted upon society, thus minimizing judicial subjectivity. The assessment of the harm caused society involves a factual inquiry, at least to some extent, and a reviewing court may rely on empirical studies, where available, to determine the scope of the injury occasioned by the crime. One court, for example, utilized various government reports in assessing the harm to society engendered by narcotics sales.[80] Another court, reviewing a one-year-to-life sentence for second-offense indecent exposure, drew from clinical studies of the damage inflicted upon the victims of exhibitionist displays.[81] Where such studies do not exist, the court could consider expert testimony or other documentation regarding the extent of harm caused by a particular crime. Of course, if such evidence is lacking or inconclusive, the court would be free to find, based upon the gravity of the offense, that the defendant has not been subjected to an unconstitutionally disproportionate sentence.

Although objective evidence can never precisely measure the gravity of various offenses, the court need not fix the crime's seriousness with precision. The proportionality principle prohibits only penalties grossly disproportionate to the crime. A court must only estimate the range of gravity within which the crime falls; vast differences between that range and the severity of the sentences imposed indicate gross disproportionality. In this limited inquiry, courts have sufficient guidance to ensure results not bottomed merely upon judges' subjective impressions.

B. Intrajurisdictional Comparisons

In addition to weighing the severity of punishment against the gravity of the offense, a court applying the proportionality test also will compare the sentence imposed on the defendant against the penalties levied for other crimes — particularly far more serious crimes — in the jurisdiction.[82] Gross disproportionality, in violation of the eighth amendment, will be suggested if these other crimes are subject to lesser sanctions than those imposed on the defendant. Thus, a court might conclude that a thirty-

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tal interests threatened by these criminal acts. Passing a bad check impinges upon society's interest in the security of private property, whereas murder threatens physical security.

80. *See* People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471, *cert. denied*, 423 U.S. 950 (1975).

81. *See In re* Lynch, 8 Cal. 3d 410, 503 P.2d 821, 105 Cal. Rptr. 217 (1972).

82. *See, e.g.*, Hart v. Coiner, 483 F.2d 136, 142 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

year sentence for the possession and sale of a small amount of marijuana is grossly disproportionate, in part because armed robbery and forcible rape are punished by a maximum seven-year term in the same jurisdiction.[83]

This portion of the proportionality test assumes a reviewing court's competence to choose among the severity of offenses within the jurisdiction. Unless a court can adjudge that rape is more serious than the sale of marijuana, for instance, it will be unable to rely upon the maximum term for rapists in finding that a thirty-year sentence inflicts cruel and unusual punishment upon the seller of marijuana. In *Rummel*, however, the Court suggested that such distinctions between the severity of crimes would necessarily be flawed because lacking in objectivity.[84]

The Court identified two rationales supporting this thesis. First, it found that comparing the gravity of crimes is an "inherently speculative" task.[85] Each crime, the Court reasoned, threatens a "unique" group of social values defined by the legislature and not susceptible of being grouped with other offenses.[86] With no shared underlying values or interests, there exists no basis for comparing the gravity of any two crimes.

Although different crimes indeed may threaten different social interests, the position that each crime is "unique" and not comparable with others seems extreme. If each crime were truly unique, the gravities of murder and assault, for example, could not be compared: a court could not assert that murder is more serious than assault. This result, however, runs contrary both to common sense and to decisions such as *Coker v. Georgia*,[87] where four Justices found murder to be a more serious offense than rape.[88] Thus, the premise that crimes are entirely unique

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83. *See, e.g.*, Downey v. Perini, 518 F.2d 1288 (6th Cir.), *vacated*, 423 U.S. 993 (1975).

84. *Rummel*, 445 U.S. at 275.

85. *Id.* at 282 n.27.

86. *Id.*

87. 433 U.S. 584 (1977).

88. *See id.* at 598 (rape is not as serious as murder because "rape by definition does not include the death of or even the serious injury to another person"). For a criticism of the Court's argument, see Note, Coker v. Georgia: *Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714, 1719-20 (1978).

Similarly, other courts have found the eighth amendment to be violated by the imposition of a greater punishment upon a lesser included offense of the same sort. *See* Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976) (where maximum penalty for assault with intent to kill is 15 years, a prison sentence of 20 years for each count of assault inflicts cruel and unusual punishment), *cert. denied*, 430 U.S. 973 (1977); Cannon v. State, 203 Or. 629, 281 P.2d 233 (1955) (life imprisonment for assault with intent to commit rape violates the eighth amendment, where the maximum penalty for rape is 20 years).

and incomparable must be rejected.

The *Rummel* Court's second, related argument against comparing the punishments for other crimes within a particular jurisdiction is open to similar objections. The Court reasoned that intrajurisdictional comparisons were suspect because "rational people could disagree as to which criminal merits harsher punishment."[89] Indeed, this may be true to some extent: rational people could disagree concerning whether an embezzler of bank funds merits harsher punishment than an armed robber making off with a smaller amount of money[90] — but no rational person would maintain that murder constitutes a less serious offense than assault. Again, the Court's argument proves too much.

Nonetheless, the Court's second objection to intrajurisdictional comparisons does suggest a genuine problem with this aspect of the proportionality test. A judicial determination of the relative severity of two crimes may be rationally controvertible because it relies more on the judge's personal values and experience than on recognized principle. Such "subjective" determinations would be most likely if a court were to engage in subtle comparisons between offenses; for instance, a judge who decides that assault with intent to kill is more serious than kidnapping makes a subtle and suspiciously subjective judgment. A reviewing court, therefore, when administering the second element of the proportionality test, must refrain from making overly refined determinations regarding the relative severity of compared offenses.

Rummel itself provides a useful standard for determining acceptable judgments of the relative gravity of offenses. A judicial judgment of the gravity of an offense relative to other crimes punished in the jurisdiction is acceptable only if rational people would not dispute that judgment. Such a restriction upon courts applying proportionality analysis would prevent subtle, overdrawn distinctions between constitutionally acceptable levels of punishment, while enabling eighth amendment review of prison sentences within the realm of judicial competency.

C. *Interjurisdictional Comparisons*

The third element of the proportionality test calls for a reviewing court to compare the sentence at issue with the penalties imposed for the same crime in other jurisdictions. Contem-

89. 445 U.S. at 282 n.27.
90. *See id.*

porary attitudes — reflected by the sentencing patterns among the states[91] — regarding the proper level of punishment thus inform the constitutional judgment.[92] A challenged penalty far in excess of nationwide practices, therefore, would conflict with contemporary values, suggesting disproportionate punishment in violation of the eighth amendment.

The *Rummel* Court expressed concern that such comparisons would unduly interfere with state autonomy in the administration of criminal justice. The Court reasoned that to infer constitutional disproportionality in part from interjurisdictional comparisons would presume "a constitutionally imposed uniformity" among the states.[93] This "uniformity," the Court posited, would prevent any state from punishing particular crimes more severely than other states — thereby inducing restraints on state policies that would be "inimical to traditional notions of federalism."[94]

The Court, however, misunderstands the constitutional significance of a disparity between a particular prison sentence and prevailing practice among the states. Not every such disparity suggests disproportionality;[95] the Constitution prohibits only grossly disproportionate penalties, so that only punishment far

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91. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 179 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.").

The *Rummel* majority, however, questioned a court's competence to define adequately the relevant sentencing pattern. The Court noted several "complexities confronting any court that would attempt [an interjurisdictional] comparison," although these "complexities" were not "inherent flaws" in the interjurisdictional analysis. 445 U.S. at 281. For a discussion of this argument, see *infra* notes 98-107 and accompanying text.

92. *See* Trop v. Dulles, 356 U.S. 86, 103 (1958); Weems v. United States, 217 U.S. 349, 378 (1910).

93. 445 U.S. at 282.

94. *Id.* The Court, however, has found "national practice" to be a suitable objective measure of at least one other constitutional standard. In Baldwin v. New York, 399 U.S. 66 (1970) (plurality opinion), the Court held that a defendant charged with a crime punishable by more than six months imprisonment had a sixth amendment right to jury trial. The Court found that every court except those of New York City, where the defendant was convicted, permitted a jury trial on charges of crimes punishable by sentences longer than six months. Speaking for the plurality, Justice White remarked that the "near uniform judgment of the Nation" was an "objective criterion by which a line could . . . be drawn" around offenses that would be regarded as sufficient to invoke the defendant's right to jury trial. *Id.* at 72-73.

95. A particular sentence should withstand scrutiny so long as at least a significant number of the states impose equivalent or more severe punishment for the same crime. *See* Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976) (10- to 20-year sentence for nonforcible rape of a 13-year-old female equivalent to or less than the penalties imposed by 16 states and District of Columbia for the same crime; sentence held constitutional under the eighth amendment).

exceeding nationwide norms[96] would run afoul of the eighth amendment. Consequently, the interjurisdictional comparison permits a wide diversity of approaches among the states, recognizing the states' considerable — but not unlimited — freedom to punish felons according to their own standards.[97]

In addition to its desire to avoid intrusions upon state functions, the *Rummel* Court identified several practical "complexities" presented by interjurisdictional analysis. First, the Court expressed misgivings about how to treat statutes in other states that had provisions similar but not identical to the statute under which the defendant was sentenced.[98] For example, Rummel had been prosecuted under a Texas recidivism statute mandating a life sentence for anyone convicted of three felonies. The Court noted, however, that other states impose a mandatory sentence upon recidivists after four rather than three felony convictions, or require the defendant to have committed at least one "violent" felony, or entrust the decision to the judge or jury whether to impose a life sentence upon the recidivist.[99] The Court con-

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96. It is difficult to define precisely when a penalty greatly exceeds nationwide practice. Diversity in sentencing practices among the states is a justifiable result of our pluralistic society. Nevertheless, where the national pattern is not a relatively continuous gradation from the less severe to the most severe penalty, a national trend will appear. Although courts should tolerate substantial diversity, they should hold disproportionate those practices that do not represent reasonably expected variations on the national trend. *See, e.g., In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (defendant's sentence of one-year-to-life for second offense of indecent exposure would have been imposed by only two other states, the remaining states punishing the crime with "a short jail sentence and/or a small fine").

97. One court has also argued that the severity of a punishment should match the magnitude of the state's problem with the crime — rather than the gravity of the crime itself. *See* Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979). The penalties imposed by other states and interjurisdictional comparisons, consequently, would have no significance: "If the punishment must fit the crime, the legislature must look at the crime as found in its own borders and the action of states faced with drug problems of lesser magnitude are of little importance." *Id.* at 415.

This view, however, is inconsistent with the proportionality principle. The eighth amendment instructs that a penalty is unconstitutional if grossly disproportionate to the severity of the *crime*, not to the severity of the state's *problem* with the crime. Thus, a harsh penalty for a petty crime would be prohibited by the proportionality principle even if the incidence of the crime reached epidemic levels. Judge Oakes, for example, dissenting in *Carmona*, recognized that, besides the defendant's crime of drug trafficking, "New York also has [possibly] more serious traffic in stolen securities and counterfeit money and more income tax, nursing home and welfare fraud than other states, but if these facts were true they would not justify disproportionately higher sentences for those crimes." *Id.* at 424 (Oakes, J., dissenting). In the words of Justice Marshall, the high incidence of motor vehicle theft and larceny in New York "could not insulate Draconian penalties for such offenses from constitutional challenge." Carmona v. Ward, 439 U.S. 1091, 1102 (1979) (Marshall, J., dissenting from denial of certiorari).

98. *See* 445 U.S. at 279-80.

99. *Id.*

cluded that it would be difficult "to evaluate the position of any particular recidivist scheme within [this] complex matrix."[100]

Upon closer examination, however, the difficulty disappears. The constitutionally significant questions are whether and to what extent Rummel would have been treated more harshly by these alternative recidivist statutes. These questions, directed at the Court's illustrations, are answered easily. A statute requiring four felonies for mandatory life imprisonment would not have imposed that sentence upon a defendant who, like Rummel, had committed only three felonies. Nor would a statute requiring a "violent" felony have imposed such a sentence on Rummel, who committed only felonious property offenses. In contrast, the statute leaving sentencing decisions to the judge or jury is arguably no less harsh than the Texas law, because it would expose the defendant to the same maximum penalty. The important point, though, is that differences between the Texas habitual offender provisions and these other statutes could readily be perceived. These differences might be "subtle rather than gross"[101] — and thus not indicative of disproportionality — but they certainly could be subjected to eighth amendment scrutiny.

The Court noted a further complexity in comparing recidivism statutes: not all states offer a parole possibility.[102] Unlike Texas, Mississippi, for instance, imposes a life sentence without parole upon the third felony conviction.[103] Yet, the Court did not make clear how the need to distinguish between recidivism statutes having differing parole alternatives would "complicate" the interjurisdictional analysis. Simply stated, the possibility for parole would be another — perhaps major — factor in comparing the harshness of punishments among jurisdictions.[104] This would seemingly be a simple rather than complicated comparison.[105]

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100. *Id.* at 280.

101. *Id.* at 279.

102. *Id.* at 280-81.

103. *Id.* at 281.

104. *See* Rummel v. Estelle, 587 F.2d 651, 660 (5th Cir. 1978) (suggesting that the possibility for parole can mitigate the harshness of a prison sentence), *aff'd*, 445 U.S. 263 (1980). For discussion regarding whether the likelihood of parole should be considered in eighth amendment proportionality analysis, see Schwartz, *supra* note 55, at 414-17; 19 DUQ. L. REV. 167, 177 (1980); 12 ST. MARY'S L.J. 525, 538 (1980); 38 WASH. & LEE L. REV. 243, 253 (1981).

105. The only complication, in fact, arises from *Rummel*'s vague pronouncements on the weight to be given a parole possibility in assessing the severity of a statutory sentence. On the one hand, because there is no right to parole, the Court acknowledged that Rummel's life sentence, despite the possibility for parole, could not be considered "equivalent to a sentence of 12 years." 445 U.S. at 280. On the other hand, the Court did not treat Rummel's punishment as a sentence for life. *See id.* at 268, 281. The severity of

Finally, the Court identified the "variable" of "prosecutorial discretion" as making interjurisdictional comparisons even more difficult, pointing out that prosecutors often exercise discretion in eliminating truly "petty" offenders from the literal scope of an habitual offender statute. The flexibility induced by such discretion, however, should not complicate the analysis.[106] The Court apparently assumed that most, if not all, recidivist schemes invest the prosecutor with discretion in invoking the statute.[107] But for purposes of interjurisdictional analysis, the relevant inquiry should be into societal expectations, as embodied in the criminal statutes, regarding the proper punishment for a given offense; prevailing community attitudes will be controlling, rather than the individual instance where a prosecutor might screen out a trivial case.

CONCLUSION

Judicial involvement in reviewing statutorily mandated criminal punishment reflects the recognition that legislatures will not always adhere to the limitations established by the eighth

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Rummel's sentence, therefore, must lie somewhere between 12 years and life. The Court, however, gave no guidance as to the strength of the parole factor in assessing the sentence's severity. The majority provided no more guidance than to observe that a court "could hardly ignore the possibility that he [Rummel] will not actually be imprisoned for the rest of his life." *Id.* at 281.

106. The Court's chief concern may have been that Rummel's "entire criminal record" would have been introduced in new proceedings if Rummel's life sentence were deemed unconstitutional. *See id.* at 281. Because the likely result would be the discovery of additional felony convictions, *see supra* note 10, the Court wondered "whether [the sentencing] court could then sentence Rummel to life imprisonment even though his recidivist status based on only three felonies had been held to be a 'cruel and unusual' punishment." *Id.* Thus, it could be argued that "the Court upheld the sentence at least in part for fear that if it did not, the recidivist statute for any number of felonies greater than three would have been rendered ineffectual." Comment, Rummel v. Estelle: *Leaving the Cruel and Unusual Punishments Clause in Constitutional Limbo*, 15 VAL. U.L. REV. 201, 225 (1980). This fear, however, appears unfounded. Rummel challenged the statute as applied to his three particular property offenses, 445 U.S. at 270-71; he did not dispute the state's authority to impose the life sentence for only *three* felonies, but for three *specific* felonious property offenses. Consequently, any holding striking down Rummel's punishment would have left the state courts free to impose the sanctions of the recidivist statute upon proof of three (or more) egregious felonies. If the Court had overturned Rummel's life sentence based upon the commission of three felonious property offenses, a sentencing court nonetheless would have retained the constitutional authority to reimpose a life sentence upon Rummel if, for example, his record had included three felony convictions for armed robbery.

107. 445 U.S. at 281 ("It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes or in plea bargaining so as to screen out truly 'petty' offenders who fall within the literal terms of such statutes.").

amendment. Courts should not abdicate this essential function when confronted with challenges to felony prison terms — effectuation of the constitutional prohibition against cruel and unusual punishment requires nothing less than uncompromising judicial review. The Supreme Court's decision in *Rummel* to jettison proportionality review of sentence length remains unpersuasive; state courts should preserve an area within their own constitutional law that would afford relief to defendants such as William Rummel.

—*Thomas F. Cavalier*